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SUPREME COURT OF THE UNITED STATES

FLORIDA *v.* DAMASCO VINCENTE RODRIGUEZ

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

No. 83-1367. Decided November 13, 1984

JUSTICE MARSHALL dissents.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins,
dissenting.

With increasing frequency this Court seems prone to disregard important differences between cases that come to us from state tribunals and those that arise in the federal system. See *Maryland v. Munson*, — U. S. —, — (1984) (STEVENS, J., concurring). As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land. The unusual action the Court takes today illustrates how far the Court may depart from its principal mission when it becomes transfixed by the spectre of a drug courier escaping the punishment that is his due.

I

Some five years ago a Florida trial judge conducted the suppression hearing in this case and a county narcotics officer testified at some length. The transcript contains a somewhat improbable account of the respondent either running in place or frantically running in circles in the presence of the agent,¹ and the agent identifying himself to the respondent

¹"THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place. You might say mov-

as a police officer in order to be sure he would not be mistaken for a member of the Hare Krishna.²

After hearing all of the officer's testimony, the trial judge stated:

"Counsel, I am going to rule as a matter of fact that they did nothing wrong, that there was no reason to stop

ing slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.

"THE COURT: Did he run or walk?

"THE WITNESS: Neither. He was pumping up and down.

"THE COURT: You said he ran up a minute ago. Did he go from a walk to pumping to a run?

"THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time.

"Do you understand what I'm saying?

"[THE PROSECUTOR:] Detective McGee, can you come down from the witness stand and show us.

"THE COURT: Like running in place?

"THE WITNESS: Sort of like this (indicating).

"To demonstrate, he was stamping with his suitcase and shoulder bag when the guy told him in a strained tone to get out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet was going up and down and he was moving, but—

"THE COURT: All right. Have a seat.

[THE WITNESS:] "He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

"THE COURT: Maybe that's the way he walks." Tr. 52-54.

"[THE WITNESS:] I identified myself as a police officer for a couple of purposes: Because the observations I had made, number one; number two, so that at the airport when we do in fact ask someone to talk to us, we properly identify ourselves so they do not think we are Hare Krishnas or someone trying to rip them off or something in that manner.

"We identify ourselves as a police officer. I do so to show my respectability of the person and in fact that I would just like to hold some conversation with him.

these men for contact or for any other reason at that point in time. The whole case hinges on whether or not there was consent given subsequent to that time. Let me hear your argument to that." Tr. 104.

After hearing argument, the judge ruled that respondent had not voluntarily consented to a search of his luggage. In making that ruling, the judge relied, in part, on the fact that the narcotics agent had not advised the respondent that he had a right to refuse to consent to the search.

Today this Court holds (1) that the officer did have an "articulable suspicion" that justified a temporary seizure of respondent's person; and (2) that the trial judge did not articulate a legally sufficient basis for his conclusion that respondent did not voluntarily consent to the search of his bag. Accordingly, the Court remands the case to the Florida Court of Appeal for further proceedings.

To understand the unusual nature of this disposition, it is necessary to comment on some of the events that have transpired in this litigation during the past five years.

II

On September 23, 1980, after full argument, the District Court of Appeal of Florida for the Third District filed an opinion which reads in its entirety as follows:

"PER CURIAM.

"Affirmed on the authority of State [v.] Battleman, 374 So. 2d 636 (Fla. 3d DCA 1979)."

The Florida Attorney General did not ask the Florida Supreme Court to review that decision. He did not do so because the Florida appellate system has been carefully structured to enable the state's highest court to concentrate on matters of greater public importance than the possibility that a trial judge's error might not have been corrected by the

"THE COURT: Don't Hare Krishnas usually have their heads shaved?" Tr. 64-65.

intermediate court of appeal. As the Florida Supreme Court explained in a 1958 opinion:

"We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. . . . The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) quoted with approval in *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980).

Recognizing that the Florida Supreme Court does not provide a forum for error-correcting review of lower court judgments in that State's judicial system, the Florida Attorney General instead filed a petition for writ of certiorari in this Court. Because the petition did not present any question of general significance, on May 26, 1981, this Court wisely denied certiorari. Presumably because they were convinced that error had been committed, three Members of the Court dissented from that disposition and stated that they "would grant certiorari and reverse the judgment." 451 U. S. 1022 (1981).³ The Attorney General of Florida then filed a timely petition for rehearing.

³The suggestion of summary reversal by the three Justices underscores the point that no one has ever considered this case worthy of plenary review by this Court.

III

Rule 51.2 of this Court's Rules requires that the grounds set forth in a petition for rehearing "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." The principal ground advanced by Florida in its petition for rehearing was that a succession of clearly erroneous *per curiam* decisions of the State Court of Appeal was having a devastating effect on its prosecutions. As an "intervening circumstance," it noted that the State had filed a petition for certiorari in *Florida v. Royer*, 460 U. S. 491 (1983). In my opinion neither of these grounds satisfied the terms of our Rule. In any event, the petition for a rehearing remained on the Court's docket for the next two years.

Rule 51 further provides that no petition for a rehearing will be granted without an opportunity to submit a response. Sup. Ct. R. 51.3. In 1983, when respondent was at long last asked to respond to the state's petition, we learned that he was a fugitive from justice and no longer was represented by counsel. On May 21, 1983, the Court entered an order granting the petition for rehearing, reversing the judgment of the Court of Appeals and remanding the case to the Florida District Court of Appeal for reconsideration in the light of our opinions in *Florida v. Royer*. — U. S. —.

IV

On November 15, 1983, the District Court of Appeal of Florida filed an opinion which reads, in its entirety, as follows:

"PER CURIAM. Affirmed."

The Attorney General thereafter filed another petition for certiorari in this Court,⁴ and today the Court rewards him

⁴Because the District Court of Appeal's decision in this case was rendered without any statement of reasons, it does not "expressly" decide a constitutional question or "expressly" conflict with other authority as the the jurisdictional provision in the Florida Constitution requires for dis-

for this effort. I continue to believe, however, that this case does not present any legal issue warranting review in this Court.

At the time the District Court of Appeal's opinion was filed, every decision cited in the Court's opinion today had already been decided. Presumably, the petitioner called all of those cases to the attention of the Florida District Court of Appeal. Since the Court does not purport to announce any new principle of law, it is also fair to presume that the Florida District Court of Appeal was already familiar with the legal principles discussed by the Court today. Thus, the Court performs the error-correcting function that the Florida Supreme Court has refused to perform, and reverses the state court's judgment by applying settled principles to the facts of this case.

V

The Court's opinion today is flawed in at least two respects. It is highly unusual for this Court to undertake *de novo* review of the factual findings of a state court on the "articulable suspicion" issue. My colleagues did not hear the witness testify; they have insufficient time to study the transcript with the care that is appropriate to credibility determinations; and, indeed, collectively they have only minimal experience in the factfinding profession.

Moreover, the Court's disposition of the consent issue implicitly assumes that the Florida Court of Appeal has a duty to explain its reasons for affirming the trial court's judgment. If that court, upon remand, simply enters another one-word order affirming the trial court's judgment, I would suppose that this Court would have to interpret the ruling as a determination on the existing record that the respondent did not voluntarily consent to the search of his luggage. A petition for certiorari on that question would present "a fact-bound

cretionary review in the Florida Supreme Court. Fla. Const. Art. V, § 3(b)(3). See *Jenkins v. State*, 385 So. 2d 1356, 1357 (Fla. 1980).

issue of little importance." *Massachusetts v. Sheppard*, — U. S. —, — n. 5 (1984). If we presume, as I think we should, that the judges of that court were already familiar with the cases discussed in this Court's opinion, I do not understand why we should not make the same assumption on the record as it presently exists.

VI

There is a certain irony in the fact that respondent is a fugitive from justice. If he is apprehended, he probably will be punished for his flight from justice even if the suppression order is ultimately upheld. Perhaps this Court's tireless efforts to bring this one man to justice will result in convictions on both counts. In either event, I believe this Court should abandon its error-correcting role in cases on direct review from state courts. Instead, the Court ought to take a lesson from the Supreme Court of Florida and focus its attention on issues of overriding importance to the administration of justice. The single-minded achievement of results in individual cases is not a virtue that should characterize the work of this Court.

I respectfully dissent.